



STATE OF MINNESOTA

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Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

***Re: Advance Notice of Proposed Rulemaking Concerning Caller Identification —
FTC Matter No. P104405***

Dear Mr. Clark:

The Office of the Minnesota Attorney General (“OAG” or “Office”) submits the following written comments to the Federal Trade Commission (“Commission”) in response to the questions and issues raised in the above-entitled notice of proposed rulemaking (“NPRM”) concerning the caller identification (“Caller ID”) provisions of the Telemarketing Sales Rule (“TSR”), published in the Federal Register on December 15, 2010.

I. CALLER ID “SPOOFING” IS A SUBSTANTIAL PROBLEM FOR CONSUMERS.

In its NPRM the Commission asks “[h]ow widespread is consumer use of Caller ID services to screen unwanted calls.”¹ Based on its interactions with Minnesota consumers, the OAG’s believes that Caller ID is the primary manner in which consumers identify who is calling them, and whether they desire to answer the call. Accordingly, the manipulation of Caller ID information to display a false identity and/or telephone number for the caller—a practice referred to as Caller ID “spoofing”—is a substantial and increasing problem for Minnesota consumers and their ability to control their contact with telemarketers.² The OAG has received hundreds of complaints from Minnesotans who have been subject to one or more phone calls from telemarketers who falsified the identifying information on the consumer’s Caller ID. Indeed, spoofing is one of the most common type of telecommunications-related complaints that Minnesota consumers lodge with the OAG. This Office believes that the volume of spoofing complaints it receives is indicative of both consumers’ dependence on Caller ID services for call screening, and the pervasiveness of the current spoofing problem.

¹ See 75 Fed. Reg. 78,183 (Dec. 15, 2010).

² This remains true notwithstanding a Minnesota statute expressly prohibiting the “blocking” or “circumvent[ion]” of a Minnesota consumer’s Caller ID. See Minn. Stat. § 325E.312, subd. 3 (“No caller who makes a telephone solicitation to a residential subscriber in this state shall knowingly use any method to block or otherwise deliberately circumvent the subscriber’s use of a caller identification service.”).

Furthermore, the vast majority of spoofing complaints that this Office has received relate to callers that come within the purview of the TSR.³ Below are just a few examples of unscrupulous telemarketers who have spoofed the Caller ID of Minnesota consumers:

- A consumer from Eagan, Minnesota reported the receipt of a call to the OAG that was identified by his Caller ID as coming from “VA Medical Center.” The caller was in fact an alleged interior design service that wanted to stop by for a consultation. An attempt to contact the supposed “interior design” company at the number identified by the consumer’s Caller ID was unsuccessful because the displayed number was actually disconnected.
- A consumer from Bemidji, Minnesota reported that he and his wife received numerous, intrusive calls from a company identifying itself as “Consumer Financial Services.” The citizen’s Caller ID displayed at least seven different numbers associated with this caller. When the OAG later dialed these numbers, it received answering machines at home residences, a cell phone voice mailbox, a fax machine, an elderly person, and multiple disconnected numbers. None of the numbers were associated with any “Consumer Financial Services.”
- A consumer from Hawley, Minnesota received numerous unsolicited calls from persons selling bogus car warranties. The citizen’s Caller ID falsely reflected that the solicitors were calling from entities such as the New York State Employees Federal Credit Union and Humana Healthcare. The citizen was unable to contact the actual persons responsible for the calls due to the Caller ID spoofing.
- A consumer from Mounds View, Minnesota contacted the OAG after telemarketers spoofed his home telephone number by transmitting it to the other consumers whom they were soliciting. The citizen received 400-500 “return” calls from these other consumers unhappy about receiving the unwanted solicitations.

While the above circumstances amply demonstrate improper telemarketer spoofing in Minnesota, such spoofing problems are not local in scope. As the Commission is aware, on December 22, 2010 President Obama signed into law the anti-spoofing Truth in Caller ID Act of 2009.⁴ The Act prohibits the knowing transmission of “misleading or inaccurate” Caller ID information “with the intent to defraud, cause harm, or wrongfully obtain anything of value,” and imposes forfeiture and criminal penalties for its violation.⁵ Congress concluded that such legislation was necessary because Caller ID spoofing is being used to orchestrate numerous fraudulent scams, and was more generally ripe for abuse “by criminals, identity thieves, and

³ See generally 16 C.F.R. Part 310 (Telemarketing Sales Rule).

⁴ See Truth in Caller ID Act of 2009, Pub. L. No. 111-331 (2010).

⁵ *Id.*

others who wish to harm or deceive someone.”⁶ In other words, Congress itself has found that spoofing is national problem of significant magnitude.⁷

Furthermore, even members of the telecommunications industry have acknowledged the magnitude of the Caller ID spoofing problem. In a Caller ID spoofing proceeding currently pending before the Minnesota Public Utilities Commission (“MPUC”),⁸ Qwest has indicated that Caller ID spoofing causes confusion and anger among its customers.⁹ AT&T has stated that spoofing has resulted in Caller ID services being used to the detriment of consumers, and that many of its customers “have become victims as a result of third party Caller ID Spoofing schemes.”¹⁰ The Minnesota Telecom Alliance has acknowledged that spoofing is nothing more than the “sophisticated and deliberate electronic deception of...end user customers,” and has further stated that the “anger and frustration of end user customers who have been deceived is fully understandable.”¹¹ There is thus no divergence between consumer and industry groups about the seriousness of the problems raised by Caller ID spoofing. The Commission should take aggressive action to protect consumers from what is one of the primary areas subject to spoofing abuse: unsolicited telemarketing calls.

II. THE WIDESPREAD MANIPULATION OF CALLER ID INFORMATION HAS SUBSTANTIALLY UNDERMINED THE CURRENT PROTECTIONS AFFORDED BY THE TSR.

The TSR is a critical regulation preventing the use of abusive, unfair, and deceptive business practices in the telemarketing of goods and services to consumers. Aside from the Do-Not-Call registry itself, the current Caller ID provisions of the TSR found at 6 C.F.R. § 310.4(a)(7)¹² have provided perhaps the best protection to consumers who do not want to receive unsolicited telemarketing calls in their home. Until the rise of Caller ID spoofing, this provision acted as a further mechanism to help consumers screen out unwanted telemarketing calls, including such calls made in violation of the Do-Not-Call registry.

⁶ See Truth in Caller ID Act of 2009, S. Rep. No. 111-96, at 1-2 (2009).

⁷ Various states from around the nation have also recently passed anti-spoofing legislation, including Minnesota, Florida, Illinois, Louisiana, Minnesota, and Oklahoma. See Minn. Stat. § 325E.312; Fla. Stat. § 817.487; 815 Ill. Comp. Stat. § 517/10; La. Rev. Stat. Ann. § 51:1741.4; Miss. Code Ann. § 77-3-805; Ok. Stat. Ann. § 776.23.

⁸ See Minnesota Public Utilities Commission, *In the Matter of the Department of Commerce Complaint Regarding Caller ID, CLASS-Related Services, “Caller ID Spoofing,” “Vishing” and Caller ID “Unmasking” or “Call Trapping” Services*, Docket No. P-999/C-08-1391 (Nov. 21, 2008). All filings in this MPUC proceeding are available online at www.edockets.state.mn.us.

⁹ See *id.* (Qwest Corporation’s Comments, E-Filing No. 20102-46893-01 (Feb. 8, 2010)).

¹⁰ See *id.* (Comments of AT&T Communications of the Midwest, Inc. and TCG Minnesota, Inc., E-Filing No. 20102-46874-01 (Feb. 8, 2010)).

¹¹ See *id.* (Comments of Minnesota Telecom Alliance, E-Filing No. 20102-46896-01 (Feb. 8, 2010)).

¹² Section 310(a)(7) of the TSR presently states that, subject to limited exceptions, it is violation of the rule for a telemarketer to fail “to transmit or cause to be transmitted the telephone number[] and...name of the telemarketer[] to any caller identification service in use by a recipient of a telemarketing call.” See also 47 C.F.R. § 64.1601(e) (Federal Communications Commission regulation similarly preventing caller ID manipulation by telemarketers).

In discussing the necessity of including 6 C.F.R. § 310.4(a)(7)'s Caller ID provisions within the TSR in 2003, the Commission highlighted three primary benefits of the rule:

- requiring telemarketers to transmit Caller ID information enhances consumer privacy by allowing consumers to screen out unwanted telemarketing calls,
- eliminating telemarketing anonymity benefits consumers and telemarketers by distinguishing the responsible telemarketers (and the companies who hire them) from the unscrupulous ones, and ensuring consumer good will accrues only to the former, and
- requiring telemarketers to transmit Caller ID information furthers effective enforcement of consumer-protection laws (including the TSR itself) by allowing regulatory agencies to hold accountable those telemarketers that violate applicable statutes or regulations.¹³

All three of these rationales, however, are entirely dependent on the transmission of *accurate* Caller ID information, and therefore spoofing undermines *every* benefit the Commission sought to foster through the addition of 6 C.F.R. § 310.4(a)(7) to the TSR. The explosion of Caller ID spoofing over the last several years has substantially degraded the effectiveness of the protections contained in the TSR. The fact that the technology needed to manipulate a consumer's Caller ID has become widespread, cheaply obtainable, and simple to use¹⁴ is likely to further undermine the TSR as more and more telemarketers acquire the means to easily spoof call recipients. In short, the current provisions in the TSR relating to Caller ID are no longer adequate, and Caller ID spoofing has become so prevalent that consumers cannot rely on Caller ID to reveal the true identity of the caller. The Commission should strengthen the TSR by further restricting telemarketers' ability to spoof the Caller ID of the individuals whom they are calling.

III. THERE IS A SUBSTANTIAL NEED FOR ADDITIONAL REGULATION OF TELEMARKETER SPOOFING NOTWITHSTANDING OTHER SPOOFING-RELATED LAWS.

The fact that Congress and some states have enacted legislation regulating Caller ID spoofing does not lessen the need for the Commission to be proactive in ensuring the TSR protects consumers from spoofing in the context of telemarketing calls. First, telemarketing calls pose an increased risk of fraudulent and abusive conduct (hence the TSR's existence in the first

¹³ See 68 Fed. Reg. 4,623-4,628 (Jan. 29, 2003); see also 75 Fed. Reg. 78,181 (Dec. 15, 2010) (summarizing the Commission's earlier discussion of these three points).

¹⁴ See Truth in Caller ID Act of 2009, S. Rep. No. 111-96, at 2 (2009) (stating that "[i]n the past" Caller ID "spoofing required special phone connections and expensive equipment," but now "advances in technology" make it "easier for callers to transmit any caller ID information the calling party chooses"); see also Truth in Caller ID Act of 2010, H.R. Rep. No. 111-461, at 3 (2010) (stating that, while spoofing "has been possible for years," the growth of new technologies has resulted in spoofing becoming "easier and less expensive to execute").

place). Other legislative efforts take up spoofing only in a general sense, and have not targeted the specific issue of telemarketing. The TSR's sole focus on telemarketing would allow the Commission to curb problematic practices in this area that are left unaddressed in more general anti-spoofing laws.

Second, the language of the Truth in Caller ID Act of 2009 requires the "knowing" manipulation of Caller ID information with the "intent" to defraud.¹⁵ The statute is thus directed at more "pure" scams involving Caller ID spoofing, such as individuals seeking to engage in identity theft and money-wire scams.¹⁶ These strict *scienter* requirements also narrow the scope of the Act by, for example, potentially excluding businesses that facilitate telemarketer spoofing from the Act's purview.¹⁷ Lastly, as I am sure the Commission is aware, such high evidentiary hurdles can often be difficult to prove even when there is overwhelming evidence of deceptive or unfair business practices on the part of a company. For all these reasons, this recent federal legislation is no substitute for newly promulgated TSR provisions addressing Caller ID spoofing.

Finally, neither can the Commission feel secure that state spoofing statutes will fill the gap because such statutes are increasingly being challenged in court. These challenges primarily focus on whether state anti-spoofing laws violate the Constitution's Interstate Commerce Clause,¹⁸ and more specifically the "dormant" Commerce Clause jurisprudence of the Supreme Court.¹⁹ In 2009, a federal court in Florida sustained such a challenge, concluding that certain aspects of Florida's anti-spoofing law were an impermissible regulation of interstate commerce.²⁰ Recently, the same plaintiffs that brought the Florida lawsuit (all of whom are spoofers) filed a similar action in Mississippi seeking to enjoin its anti-spoofing law.²¹ While this Office disagrees with Florida court's conclusion—and more generally the notion that state anti-spoofing laws run afoul of the Commerce Clause—the prospect of such legal challenges do not arise in regard to the TSR. The Commission should comprehensively address the use of Caller ID spoofing by telemarketers.

¹⁵ Truth in Caller ID Act of 2009, Pub. L. No. 111-331 (2010).

¹⁶ See Truth in Caller ID Act of 2009, S. Rep. No. 111-96, at 1-2 (2009) (citing these circumstances as justifications for the law).

¹⁷ See *infra* Section IV.B. (discussing Telephone Management Corporation).

¹⁸ See U.S. Const. Art. I, § 8.

¹⁹ See generally *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (discussing the contours of the Dormant Commerce Clause).

²⁰ See *Teltech Systems, Inc., et. al. v. Bill McCollum, in his official capacity as Attorney General of the State of Florida*, Case No. 08-cv-61664 (S.D. Fla. July 16, 2009).

²¹ See *Teltech Systems, Inc., et. al. v. Haley Barbour, in his official as Governor of the State of Mississippi*, Case No. 10-cv-00679 (S.D. Miss. Nov. 22, 2010).

IV. THE COMMISSION SHOULD AMEND THE TSR TO RESTRICT CALLER ID SPOOFING.

In its NPRM the Commission specifically ask commentators whether “changes to the TSR [would] improve the ability of Caller ID services to accurately disclose to consumers the source of telemarketing calls[?]”²² For all the reasons discussed above, the answer to this question is “yes.” I urge the Commission to amend the TSR to ban the practice of Caller ID spoofing by telemarketers, as described further below.

A. Caller ID Spoofing by Telemarketers Should Be Banned.

The starting point for any spoofing-related amendments to the TSR should be a ban on the practice in regard to *both* name and number information. This is because—in stark contrast to the benefits of the accurate transmittal of Caller ID information discussed above—there are no legitimate reasons for telemarketers to spoof consumers. Indeed, the vast majority of Minnesota consumers who have contacted this Office about spoofing have also reported deceptive, fraudulent, or other abusive practices in conjunction with the spoofing. Thus, while there may be some extremely limited reasons for altering Caller ID information in a non-telemarketing context,²³ there is no similar justification for permitting telemarketers to hide their identity and/or telephone number from those they call. Such anonymity does nothing more than allow the telemarketer to invade consumer privacy, engage in unscrupulous conduct with little chance of being held accountable, and sully the reputation of other responsible telemarketers following the law.

The Commission specifically asked in its NPRM whether “the Caller ID provisions of the TSR [should] further specify the characteristics of the telephone number transmitted to any Caller ID service?”²⁴ The best way to protect consumers would be for the Commission to mandate that telemarketers transmit the number from which they are actually calling (i.e. ban Caller ID spoofing), and I urge the Commission to do so. The Commission raises in its NPRM the prospect of permitting telemarketers to manipulate Caller ID number information by, for example, substituting their actual telephone number for a number that is answered by an “automated service[] that identify[ies] the telemarketer,” a number “listed in publicly available directories as the telephone number of the telemarketer,” or a number that is the “same as the telephone number that is listed in direct mail solicitations...for the telemarketer.”²⁵

All these (and other) types of number substitution still necessarily result in potential consumer deception and confusion that could be avoided by a flat ban on Caller ID spoofing. For example, if the Commission permits such substitution, a Florida-based telemarketer

²² See 75 Fed. Reg. 78,183 (Dec. 15, 2010).

²³ See Truth in Caller ID Act of 2009, S. Rep. No. 111-96, at 2 (2009) (discussing how spoofing may be beneficial in the context of calls made from a domestic violence shelter).

²⁴ See 75 Fed. Reg. 78,184 (Dec. 15, 2010).

²⁵ See 75 Fed. Reg. 78,184 (Dec. 15, 2010).

soliciting Minnesota consumers to purchase flowers could permissibly make it appear as if they were calling from Minnesota as long as the substituted Minnesota number is listed in an unspecified “publicly available directory[]” or on a “direct mail solicitation[]” that the telemarketer sent at some point in time to some unknown individual. The same could be true for a non-Minnesota telemarketer selling locksmith services (e.g. An out-of-state locksmith company could be falsely portrayed on a consumer’s Caller ID as a Minnesota, or local, company). By way of another example, such deception could be used by telemarketers when fundraising in Minnesota for an out-of-state charity, as consumers are more likely to pick up calls from local numbers they recognize than other numbers they do not recognize. Indeed, each of these examples are based on actual spoofing complaints that this Office has received from Minnesota consumers, and demonstrate why the Commission should not permit *any* type of Caller ID number substitution by telemarketers.

Lastly, such number substitution also does not ensure that a consumer who dials the substituted number will speak with someone who knows anything about the telemarketing calls at issue, who is able and willing to provide the consumer other pertinent information about the telemarketer, or even that someone will actually answer a phone call at all. All these issues are avoided if telemarketers are mandated to transmit to Caller IDs the number from which they are actually calling.

B. Third Parties Facilitating Caller ID Spoofing Should be Held Liable for Improper Spoofing by the Telemarketers They Assist.

The Commission has also asked what role third parties “play in providing services, equipment or software that allows telemarketers” to engage in spoofing, and whether the current third-party liability provision in the TSR²⁶ is “adequate to regulate [those] that assist telemarketers and sellers in manipulating caller number and name information.”²⁷ The OAG believes 6 C.F.R. § 310.3(b) is not an adequate liability provision in this instance, and that any amendments to the TSR addressing spoofing should make it easier to prosecute such third parties.

The reason a strong third-party liability provision is needed in the spoofing context is because such parties are really enablers of spoofing. For example, a entity called Telephone Management Corporation and its affiliate TM Caller ID, LLC (collectively “TMC”) are in the business of leasing telephone numbers to other businesses. This Office has received numerous complaints about telemarketer spoofing that it has linked back to telephone numbers leased by TMC. Without companies such as TMC, spoofing by many telemarketers would not be possible. In correspondence to this Office, however, TMC claims that it has “absolutely no control of

²⁶ See 6 C.F.R. § 310.3(b) (“It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates...§310.4 of this Rule.”).

²⁷ See 75 Fed. Reg. 78,183 (Dec. 15, 2010).

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whether or not [customers that lease its telephone numbers] conduct themselves in a manner consistent with the law of any state or federal body,” and refuses to take any responsibility for its critical role in assisting spoofers.

The standard for third-party liability currently in the TSR is only triggered if a third party provides assistance to a telemarketer and “knows or consciously avoids knowing” about the telemarketer’s violative conduct. The OAG believes that a separate standard for third-party liability should be added to the TSR along with any new Caller ID spoofing rules that is triggered if the third party “knows *or should have known*” about the illegal conduct. This more permissive third-party liability standard would provide law enforcement agencies an additional tool to enforce the TSR against spoofing facilitators, and the OAG urges the Commission to adopt such a standard in any promulgating any new spoofing rules.²⁸

V. CONCLUSION.

I ask that the Commission consider these comments in connection with its *Advance Notice of Proposed Rulemaking Concerning Caller Identification — FTC Matter No. P104405*. In the meantime, please feel free to contact this Office if there is any additional information that would be helpful to the Commission in considering the above comments.

Sincerely,

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²⁸ For that matter, the OAG would also support amending 6 C.F.R. § 310.3(b) to reflect this third-party liability standard.